future purchases. But I suspect in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel and other surface minerals in the immediate proximity of their lands. The answer is that the railway company must judge for themselves what extent of land is required, and take sufficient to secure the stability of their works against accidents which can readily be foreseen when the nature of the sub-soil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Acts, but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

For these reasons I am of opinion that the interlocutor under appeal should be reversed.

Interlocutors appealed from reversed; interlocutor of the Lord Ordinary of the 16th December 1885 restored, the respondent to pay to the appellants their costs in the Court below and in this House.

Counsel for the Pursuers (Appellants)—Att.-Gen. Sir R. E. Webster — Balfour Brown, Q.C. Agents—Simson, Wakeford, & Co.—Campbell & Smith, S.S.C.

Counsel for the (Defender) Respondent—Sir H. Davey, Q.C. — E. W. Byrne. Agents — Grahames, Currey, & Spens—Hamilton, Kinnear, & Beatson, W.S.

COURT OF SESSION.

Thursday, January 24, 1889.

SECOND DIVISION.

[Sheriff of Aberdeen.

MOLLISON *v.* NOLTIE.

Contract—Stock Exchange—Joint Agreement to Sell Stock not in Seller's Hands—Speculation as to Rise and Fall of Stock.

On the joint employment of two persons a broker sold a certain amount of railway stock. Neither of the parties possessed the stock at the time. The stock was continued for some months, when it was closed at a loss, and the sum due to the broker for commission and differences was paid by one of the principals.

In an action at his instance against the other adventurer for repayment of one-half of this sum, the defender pleaded that the action should be dismissed in respect that the transaction was of a gambling nature. *Held* that as the stocks had been sold to a real purchaser, and the transaction between the principals was a joint-adventure in stocks, and not a joint-adventure in gaming, the pursuer was entitled to recover from the defender the amount sued for.

Upon 16th January 1888 Hugh Mollison, late farmer, Burnside, Ruthrieston, Aberdeen, and James Noltie, grocer and spirit merchant, Aberdeen, agreed to enter into a joint-adventure in the sale and purchase of Grand Trunk Railway Company of Canada First Preference Stock. They accordingly on said date instructed Mr Alexander S. Sutherland, stock and share broker, Aberdeen, to sell for them 500 said Grand Trunk Railway Company of Canada First Preference Stock at 54$\frac{1}{8}$ per cent. Mr Sutherland made said sale. No such stock was in the hands of the parties at the time. The stock was continued till, on the 11th day of June 1886, the said quantity of stock was purchased through Mr Sutherland at 63$\frac{3}{8}$ per cent., in order to close the adventure. The sum which thus fell due to the broker for commission and differences amounted to £49, 15s. 11., which sum was paid by Mollison, who in October 1887 brought this action against Noltie for £24, 17s. 11d., being the half of the above-named sum.

The defender averred, *inter alia*—"In the beginning of March 1886 the defender called on Mr Sutherland and instructed him to close the 500 Trunks, and to let the pursuer know this. Mr Sutherland agreed to do so. From that time till 9th August 1886, two months after the stock had been purchased, the defender was not aware that said account had been closed. He believes and avers that if said stock was continued it was so continued in the name of the pursuer alone. The defender has no knowledge with whom the pursuer was dealing, and never received any sale notes, nor was he otherwise informed that a sale had been effected."

The pursuer pleaded—"(1) The defender having agreed to enter into said joint-adventure with the pursuer, and having done so, defender is bound to bear his share of the loss arising therefrom."

The defender pleaded—"(2) The defender having instructed his broker to close his account at a time when no loss would have been incurred, the defender is in the circumstances not liable to pursuer. (5) The transaction being of the nature of gambling transactions, the action should be dismissed."

After a proof, which was mainly directed to the question whether the defender had instructed Mr Sutherland to close the account in March 1886, the Sheriff-Substitute (Brown) upon 30th June 1888 sustained the defender's 5th plea-in-law, and dismissed the action.

On appeal the Sheriff (Guthrie Smith) on 25th September 1888 issued this interlocutor:—"Recals the interlocutor: Finds it proved that on their joint employment Mr A. S. Sutherland, stockbrocker, sold on their account certain railway stock, with the result that they became indebted to him in the sum of £49, 15s. 11d. for commission and differences: Finds in law that the pursuer having paid this sum to the said A. S. Sutherland, is entitled to recover from the defender his share thereof, being the sum sued for: Therefore repels the defences; decerns in terms of the conclusions of the summons; finds the defender liable in expenses, &c.

"*Note.*—On the 16th January 1886 the pursuer

and defender gave joint instructions to Mr Sutherland to sell on their account 500 Grand Trunks. Neither of them had the stock to deliver; it was in fact a 'bearing' transaction belonging to a class of dealings on the Stock Exchange which have frequently been denounced by eminent Judges as immoral and pernicious. There is no doubt also that, as between buyer and seller, a contract that the one shall receive and the other shall pay 'differences' is a wagering contract, which by Statute 8 and 9 Vict. c. 109, is null and void. But it is equally well settled that the statute only affects the contract which makes the bet or wager, and that the stockbroker employed by the seller to find for him a purchaser of the stock incurs obligations on his principal's behalf, which by the rules of the Stock Exchange are enforceable against him, and of which he has relief against his employers. In this case Mr Sutherland executed his commission by selling through a London broker, and the stock was continued till the month of June, when it was closed at a loss. In these circumstances if an action had been brought against the parties by Mr Sutherland it could not have been defended, and on general principles it is too clear for argument that if one of the two parties discharges a contract debt in which they are jointly interested, the other is liable in contribution. A more revelant defence to the action is that if the broker had closed the account when he was told to do so there would have been no loss. But this fails in fact. Mr Sutherland affirms that he acted on his instructions to close as soon as he received them; pursuer says the same, and the defender's statement to the contrary is unsupported."

The defender appealed, and argued — This was a gambling debt, and therefore the pursuer could not recover. In these circumstances the Court would not look at the agreement at all, and one of the wrongdoers could not recover from another any sum which he paid for purpose of gaming—*Risk* v. *Auld and Guild*, May 27, 1881, 8 R. 729; *O'Connell* v. *Russell*, November 25, 1864, 3 Macph. 89; *Calder* v. *Stevens*, July 20, 1871, 9 Macph. 1074; *Higginson* v. *Simpson*, January 12, 1877, L.R., 2 C.P.D. 76; *M'Kinnell* v. *Robinson*, Easter Term 1838, 3 M. & W. 434; Bell's Prin., secs. 36, 37, 550; *Don* v. *Richardson*, June 16, 1858, 20 D. 1138; *Ainslie* v. *Sutton*, December 14, 1851, 14 D. 184; *Gillies* v. *M'Lean*, October 16, 1885, 13 R. 12; *Newton* v. *Cribbes*, February 9, 1884, 11 R. 554. Secondly, the proof showed that the defender was not liable for any loss incurred after March 1886, when he had given orders to the broker to close the account.

The respondent argued—This was not a gambling transaction; the pursuer ordered the broker to sell so much stock. No doubt it was a speculation. The parties expected the stock to fall. But it was no gaming transaction. The parties simply agreed to await the result of an expected fall. Moreover, the stock was sold to a real purchaser. It was a *bona fide* transaction. There was no element of *sponsio ludicra* here—*Foulds* v. *Thomson*, June 10, 1857, 19 D. 803; Addison on Contracts, 1157. The defender was resting-owing to the pursuer in the amount sued for. The pursuer simply paid the whole loss for the sake of convenience, and that mainly on the defender's part, who by repaying the half of the loss, would only repay a loan. There was no proof that the defender had instructed the broker to close the account in March.

At advising—

Lord Justice-Clerk—There are two points in this case—one as to the evidence, the other as to the law. With regard to the former of these points, the Sheriff has found that the defender failed to make out the allegation that he gave the holder instructions to close the account in March, and that he was not aware that the account had been continued, as it afterwards turned out to have been. On this point I agree with the Sheriff.

The other question is the important one as to the law. It is the question whether the defender is justified in resisting payment of his share of the sum paid to the broker by the pursuer, on the ground that the transaction was a gambling transaction, and that the Court will not listen to a party who comes forward asking powers to enforce an alleged right arising out of such a gaming transaction. Now, having given the subject the best consideration I can, I think that the Sheriff is right on this point also. The broker Sutherland was instructed to sell a certain number of shares for both Mollison and Noltie. It is not disputed that at that time neither Mollison nor Noltie possessed the scrip, and that the transaction was a speculation. They both hoped that the market would fall, and that they would therefore make money by purchasing the stock at a lower price before it required to be delivered. In this they were unfortunate, for the market rose. Now, I think this transaction was an ordinary and *bona fide* one on the Stock Exchange, whereby a broker was instructed to sell, and did sell, the shares to a third party. Mollison and Noltie were bound to deliver the stock, and did, after the transaction had been continued over, procure and deliver it. I cannot hold that that is a transaction struck at as a gaming contract. These were not two parties wagering, and a wager requires two parties. It cannot be said that the two speculators Mollison and Noltie were wagering with the purchaser, for he was an ordinary purchaser offering to buy stock, and intending to obtain it, and not in any way engaged in a wager. Was the broker, then, engaged in wagering about the stock? He was not, for his whole interest in the matter was to obtain his commission, and to be kept by his employers free from personal liability to the purchaser.

We have, then, only Mollison and Noltie left, and they could not be wagering with each other, because under no circumstances could the one be better or worse off by the event than the other. I think the transaction comes within the rule of the case of *Foulds*, and a passage in the opinion of Lord Wood in that case is entirely applicable to this one. Lord Wood says—"To wagering or gaming there must be two parties" (and of course he means two opposing parties). "The provisions of the statute are all framed on that footing. The parties must come together directly or through their brokers. In contracts within the statute there must be opposite parties,

and there can be no innocent ignorant third parties. If a party or his broker go to another party or his broker and arrange or make a contract for the sale and purchase of shares, but where they are merely to pay the differences according to the rise and fall of the market, that would be gaming within the statute. But in the present case there is no evidence that any one of the contracts forming the transaction in the account libelled was a contract for payment of differences, and to be implemented by such payment. On the contrary, it appears that the transactions were with a great variety of brokers acting for an equal variety of constituents, and as far as seen every transaction was a real *bona fide* onerous purchase or sale from or to a party to whom a personal obligation was undertaken to fulfil the contract which he was entitled to enforce, and in which the responsibility of the pursuer as broker for the defenders did not terminate until the stocks bought or sold were either delivered or paid for." I think that with the single difference that in that case there was a variety of different transactions, which is not the case here, that paragraph of Lord Wood's opinion exactly applies. I have no hesitation in agreeing with the Sheriff.

Lord Young—I am of the same opinion. I think that the Sheriff-Substitute has somewhat misapprehended the case, not the facts so much as the law, for I see that he says—"It is not suggested that as between the seller and purchaser of the stock in question the transaction was not perfectly genuine, for that was not made fictitious by the person to whom the stock originally fell to be transferred again selling for delivery at next settling-day." No doubt the parties to this action were both speculating on a fall of the stock. That was because they were both selling it. But unfortunately for them the stock rose and they could not buy in the stock save at a loss which, as to them both, is only £49, for to that extent, taking into account the commission of the broker, the stock rose before they bought it. I think it was a genuine transaction. The purchaser of the stock demanded it, and was entitled to get it. Well, he obtained the stock, and one of the adventurers had to pay the whole £49 which they lost. Why should not the other pay part of it also? It was a genuine transaction. The buyer would, if the broker had not bought in the stock, have been entitled to sue for the difference of the price between that at which it had been sold to him and the price he would have had to pay for it, and the broker had involved himself in liability. Now, the pursuer has paid to the broker both his own share and the defender's. The speculation might have been one about any other property—a house, for example—as much as about stock. The buyer if it was not delivered to him would have been entitled to acquire it at the expense of those who undertook to sell it to him. Now, I think that if one of the sellers paid that loss it is clear that the other must pay him his share. I think the matter is well expressed in the opinion of Justice Lindley in the case of *Thacker* v. *Hardie*, 4 Q.B.D. 685, which was a case of pure speculation—"Firstly, the defendant was a speculator, and the plaintiff knew him to be so. Secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange. Thirdly, that the defendant knew, or must be taken to have known, that in order to carry out the transactions the plaintiff would have to enter into contracts to buy or sell as the case might be." Now, I think there was here no wagering. It was reprehensible speculation no doubt, but it was carried on (and there was no other way of carrying it on) by real contracts which the buyer could and did enforce against the joint speculators to their loss. I think the pursuer is entitled, having paid the whole of that loss, to recover the half of it from the defender.

On the question of fact as to the broker's instructions to carry over, I agree that the Sheriff's judgment should not be altered.

Lord Rutherfurd Clark concurred.

Lord Lee—The question is whether the ground of the pursuer's action is *sponsio ludicra?* I do not think it clear that that question is answered by the mere consideration that the purchaser from the pursuer and defender was a real purchaser. I go upon this consideration that according to the statements of both parties upon record the transaction in which they were engaged was a real and lawful joint-adventure in stocks, and not a joint-adventure in gaming or in staking money upon a chance.

The Court pronounced this interlocutor:—

"Find in fact (1) that on the joint employment of the pursuer and defender Mr A. J. Sutherland, stock-broker, on 16th January 1886 sold on their account 500 shares of the Grand Trunk Railway Company of Canada First Preference Stock, and that the said stock was subsequently purchased in order to implement said contract of sale, and was delivered and paid for by the purchaser; (2) that in respect of said transaction the pursuer and defender became indebted to the said A. J. Sutherland in the sum of £49, 15s. 11d. for commission and differences in said contract of sale: Find in law that the pursuer having paid the said sum to the said A. J. Sutherland is entitled to recover from the defender his share thereof, being the sum sued for: Therefore dismiss the appeal and affirm the interlocutor of the Sheriff appealed against; of new repel the defences, and decern in terms of the conclusions of the petition," &c.

Counsel for the Appellant—Guthrie. Agent—Robt. C. Gray, S.S.C.

Counsel for the Respondent—Comrie Thomson—Orr. Agents—Stuart & Stuart, W.S.